

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN 16 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)
)
Rate Regulation)

MM Docket No. 93-266
MM Docket No. 93-215 ✓

To: The Commission

**OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.
TO THE PETITION OF BELL ATLANTIC FOR FURTHER RECONSIDERATION**

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
Diane B. Burstein
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 775-3664

Counsel for National Cable
Television Association, Inc.

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The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its opposition to the Petition of Bell Atlantic for Further Reconsideration ("Petition"), filed on May 16, 1994, in the above-captioned proceeding. For the reasons stated below, the Bell Atlantic Petition -- which raises arguments already rejected by the Commission in these proceedings -- should be dismissed.

NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving over 80 percent of the nation's approximately 56 million cable television households, as well as cable television program networks, cable equipment suppliers, and others interested in or affiliated with the cable television industry.

Introduction and Summary

In the above-captioned proceedings the Commission adopted a benchmark/price cap approach for setting rates for regulated cable services as well as interim rules to implement a cost-of-service alternative to the benchmark/price cap approach.¹ The rules adopted in these proceedings were the subject of extensive comments and reply comments by all interested parties, including telephone industry representatives. Bell Atlantic filed comments and reply comments in the cost-of-service proceeding (MM Docket 93-215) as well as in the Commission's rate regulation proceedings (MM Docket 92-266) which established the initial benchmark/price cap regime. Bell Atlantic also filed a Petition for Reconsideration of the Commission's initial Order in MM Docket 92-266.²

In each of its pleadings, Bell Atlantic repeated the tired mantra of "regulatory parity", insisting, in the face of statutory commands, policy considerations and common sense, that the newly-regulated cable industry must be subject to every facet of the traditional regulatory regime applicable to dominant

¹ Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 93-215, FCC 94-39, released March 30, 1994 ("Cost-of-Service Order"); Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 94-38, released March 30, 1994 ("Benchmark Order"); Third Order on Reconsideration in MM Docket No. 93-266, FCC 94-40, released March 30, 1994.

² Report and Order in MM Docket 92-266, 8 FCC Rcd 5631 (1993) ("Rate Order")

carriers in the telephone industry, or, alternatively, that well-founded regulations applicable to the telephone industry be eliminated.

Comes now Bell Atlantic once again crying "regulatory parity" and seeking reconsideration of certain aspects of the rules adopted in these proceedings. In particular, Bell Atlantic seeks reconsideration of: (1) the Commission's decision to reject incorporation of a sharing mechanism into its cable price cap formula; (2) the Commission's refusal to prescribe a uniform depreciation schedule for its cable cost-of-service regime and (3) the Commission's decision to permit cable companies to recover some of the cost of promotional customer equipment offerings in their cost-of-service showings. With respect to each of these issues, Bell Atlantic points to the alleged disparity between the rate regulation regime for cable companies and that for dominant common carriers and concludes (at 5) "[p]referential treatment for cable simply cannot be justified."

But as NCTA said when Bell Atlantic last raised this familiar theme, rather than providing "preferential treatment," the Cable Act "imposes in many respects a more burdensome regulatory scheme" on cable companies than on the telephone industry. This disparity is particularly unwarranted because, unlike cable systems, telephone companies are public utilities and they provide an essential service while cable systems do not. As we said then:

For example, telephone terminal equipment was deregulated years ago, while cable's terminal equipment is regulated at actual cost. Cable services, except for pay-per-view and per channel

services, are rate regulated, but telco enhanced services operate free of regulation. Telephone service is potentially subject to rate regulation by the FCC and the states. Cable service is subject to regulation by the FCC and, potentially, by tens of thousands of local communities. Telephone rates must be reviewed by regulators only when the regulators decide they ought to be reviewed. Cable program service rates must be reviewed by the FCC if a state, franchising authority, local government or any of the nation's 58,000,000 cable subscribers complain that rates are unreasonable. While Bell Atlantic has a monopoly on telephone service, it has no monopoly on overly burdensome regulation.³

For the reasons stated below, the Bell Atlantic Petition must be dismissed.

A. Bell Atlantic's Arguments Have Been Raised Before and Rejected and Therefore Its Petition Should Be Dismissed Without Further Consideration

It is well-settled that reconsideration is not to be used to rehash arguments already presented to and rejected by the Commission.⁴ When the agency has passed on the very issues raised once again by a party on reconsideration, it may summarily dismiss those arguments.

That course of action is particularly appropriate here. As Bell Atlantic brazenly concedes, the sharing, depreciation and equipment "bundling" issues it raises on reconsideration now were

³ Reply Comments of the National Cable Television Association, Inc., MM Docket No. 93-215, filed September 14, 1993, at 8.

⁴ See e.g., WWIZ, Inc., 37 FCC 685, 686 (1964) aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966); Florida Gulfcoast Broadcasters, Inc., 37 FCC 833 (1964).

raised by it once before on reconsideration, but the Commission chose not to adopt the Bell Atlantic position on those issues. Petition at 1-2. In fact, as noted above, those issues -- particularly the call for "regulatory parity" -- were raised in the rate regulation proceeding in MM Docket No. 93-266, as well as in the initial cost-of-service proceeding, MM Docket No. 93-215.⁵ The Commission therefore has seen those arguments numerous times, yet has rejected the invitation to adopt the "regulatory parity" approach advanced by Bell Atlantic. "[B]are disagreement, absent new facts and arguments properly submitted,

⁵ See e.g. Comments of Bell Atlantic, MM Docket No. 92-266, filed January 27, 1993, at 4 ("The Commission should create a measure of regulatory parity in this proceeding...."); Reply Comments of Bell Atlantic, MM Docket No. 92-266, filed February 11, 1993, at 3 (The Commission "should remain sensitive to the importance of regulatory parity between the telephone and cable industries...."); Petition of Bell Atlantic for Limited Reconsideration, MM Docket No. 92-266, filed June 21, 1993 at 1 ("...parity of regulatory treatment between the two industries is increasingly important...."); Reply of Bell Atlantic on [sic] Petitions for Reconsideration, MM Docket No. 92-266, filed August 5, 1993, at 4 ("The Commission should reject claims that it is barred from establishing regulatory parity between the telephone and cable industries"); Joint Comments of Bell Atlantic, the NYNEX Telephone Companies and the Pacific Companies in Response to Notice of Proposed Rulemaking, MM Docket No. 93-215, filed August 25, 1993, at 1 ("the Commission's guiding principle in this proceeding should be regulatory parity...."); Joint Reply Comments of Bell Atlantic, the NYNEX Telephone Companies, and the Pacific Companies in Response to Notice of Proposed Rulemaking, MM Docket No. 93-215, filed September 14, 1993, at 8 ("Parity of treatment will promote fair competition...."). See also Comments of Bell Atlantic, CC Docket No. 94-1, filed May 9, 1994, at 11 ("...parity of regulatory treatment is critical....").

is insufficient grounds for granting reconsideration." Creation of an Additional Private Radio Service, 1 FCC Rcd 5,6 (1986).

As for the specific issues raised in its latest Petition, Bell Atlantic offers only conclusory statements with respect to its arguments concerning a cable price cap sharing mechanism, prescription of a uniform cable depreciation rate and the recovery of the cost of cable promotional equipment offerings. With respect to each of these issues, the Commission has already been made well aware of Bell Atlantic's position and, for good and sufficient reasons, has declined to follow it.

It has taken notice of the arguments on depreciation,⁶ addressed the Bell Atlantic proposal to incorporate a telco-like sharing mechanism into its cable price cap regime,⁷ and discussed in detail the question of cable operators' ability to recover "costs of equipment and installations provided to customers free

⁶ See Cost-of-Service Order at ¶131 ("Telephone companies offer different [depreciation] prescription approaches. Bell Atlantic favors uniform practices for cable and telecommunications companies.").

⁷ See Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, 8 FCC Rcd 5631, 5775 (1993) ("According to Bell Atlantic ..., a price cap scheme should be imposed on cable operators similar to the existing price cap regulation on telephone companies."); First Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 93-428, released August 27, 1993, at ¶88 ("Telephone companies also urge that we incorporate a sharing feature in the price cap mechanism for cable service similar to the one that we have included in the price cap rules for telephone carriers.") citing Bell Atlantic Petition for Reconsideration.

or at reduced prices for the purpose of promoting services" (albeit in the context of cable arguments that greater flexibility be permitted).⁸ As shown below, it has refused to adopt the Bell Atlantic position each time it has been raised. Under these circumstances, the Commission should dismiss the repetitious Bell Atlantic Petition without further consideration.

B. The Commission Should Once Again Reject Bell Atlantic's Arguments As Being Without Merit

Even if the Commission decides to once again consider Bell Atlantic's repetitious arguments on their "merits," they deserve speedy dismissal. Both its general plea for "regulatory parity" and its specific arguments regarding depreciation, sharing and recovery of the cost of promotional offerings are without merit.

As for its regulatory parity refrain, Bell Atlantic refuses to admit what is obvious to an objective observer: In the Cable Act of 1992, Congress did not authorize common carrier-like regulation for the cable industry. Indeed, Congress retained Section 621(c) of the Communications Act which provides that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." Moreover, as the legislative history of the 1992 Cable Act makes clear, in mandating rate regulation for certain cable

⁸ See Third Order on Reconsideration at ¶¶148-150.

systems, Congress did not intend "to replicate Title II regulation."⁹

Under these circumstances, Bell Atlantic's insistence on "regulatory parity" must be rejected.¹⁰ As shown below, its specific arguments are similarly without merit.

1. **Depreciation.** Bell Atlantic observes that "Cable can set its own depreciation rates according to the dictates of the market, but telephone companies can not." Petition at 2. It once again urges the Commission to prescribe depreciation rates for cable identical to those applied to telephone companies. Id. at 4. But the Commission's decision to reject prescription of depreciation rates for the cable industry was well-founded.

Unlike the case with the telephone industry, the cable industry is at the threshold stage of being regulated. As a result, cable industry depreciation rates historically have been unregulated. Operators have employed a variety depreciation practices for tax and accounting purposes. The Commission recognized that it should not -- and need not -- shoe-horn the depreciation practices of the disparate cable industry into a "one-size-fits-all" prescription. As NCTA pointed out, "there is

⁹ H.R. Rep. No. 628, 102d Cong., 2d. Sess 83 (1992).

¹⁰ While the Commission has rejected the more radical telephone industry proposals for "regulatory parity," NCTA believes the FCC nevertheless has imposed upon cable a rate regulation regime inconsistent with its statutory mandate. NCTA has sought judicial review of this aspect of the Commission decision.

no record, either before Congress or the Commission, that cable's depreciation practices have been unreasonable. To the contrary, the Commission has been encouraging the cable industry to deploy new technologies and offer new services for more than 20 years."¹¹

Under these circumstances, the Commission's conclusion that "a depreciation prescription requirement would impose unjustified burdens without providing a balancing benefit to subscribers"¹² is plainly correct. By requiring regulators to "closely monitor industry depreciation practices and carefully review depreciation showings in individual cost proceedings," the Commission can achieve its goal of assuring that industry practices are reasonable. Bell Atlantic's repetitious proposal to impose a uniform depreciation rate on the cable industry must be rejected once again.

2. Sharing. Bell Atlantic seeks to impose on cable companies a sharing mechanism as part of the cable price cap regime similar to that applicable to telephone companies subject to price cap regulation. It argues, "Cable benefits from pure price caps since they have no sharing provisions." Petition at 2. The Commission has correctly rejected this argument each time

¹¹ Comments of the National Cable Television Association, Inc., MM Docket No. 93-215, filed August 25, 1993 at 26.

¹² Cost-of-Service Order at ¶133.

Bell Atlantic (and others) have raised it.¹³ It must do so once again.

While NCTA has significant concerns with the cable price cap regime adopted by the Commission, it is plain that the Bell Atlantic proposal to incorporate a sharing mechanism into the Commission's price cap approach was properly rejected by the Commission. There is simply no basis for incorporating into the cable price cap regime such a sharing mechanism which was adopted for the telephone industry as part of the transition to price caps from the decades-old rate-of-return regulation. Not only has the cable industry never been subject to rate-of-return regulation, but the cable price cap regime is not premised on the same basis as that applicable to the telephone companies and does not possess the "starting place" issues that are part of the telco sharing mechanism justification. As the Commission correctly concluded:

Telephone companies have failed to advance a sufficient reason why we should adopt as an overriding policy goal achieving parity in price cap mechanisms for the two industries. Instead, our price cap requirements for cable and telephone services are, and should be, based on the respective, separate considerations discussed in the proceedings in which we adopted those respective requirements.¹⁴

¹³ See e.g. First Order on Reconsideration at ¶88.

¹⁴ Id. at ¶90.

Bell Atlantic's conclusory arguments in its current Petition add nothing to its previous unsupported contentions. They should once again be summarily rejected.

3. **Equipment Issues.** Bell Atlantic bemoans the fact that "cable can recover some of the cost of customer equipment in regulated rates, but telephone companies can not." Petition at 2-3. Bell Atlantic is referring to the Commission's decision to afford cable operators "substantial discretion to offer promotions, including a below cost offering for some equipment and installations" and to permit the cost of promotions to be included in an operator's general system overhead costs in a cost-of-service showing. Third Order on Reconsideration at ¶¶148-150.

Bell Atlantic's complaint that the recovery permitted for cable promotional offerings is inconsistent with the unbundling requirements applicable to telephone common carriers once again ignores the different nature of the two industries, and, in this case, the long history giving rise to the Commission requirement that telephone CPE be unbundled from telephone service. See e.g., Second Computer Inquiry, 77 FCC 2d 384, 442-44 (1980); 47 C.F.R. §64.702(e).

The telephone industry abuses giving rise to the FCC's telco unbundling policy find no counterpart in the history of the cable industry. Moreover, there was no Congressional direction in the 1992 Cable Act to prohibit promotional offerings of cable equipment and installation, another factor driving the FCC's decision on this issue. See Rate Order, 8 FCC Rcd at 5819.

Again, Bell Atlantic offers no reason -- other than its inapplicable "regulatory parity" refrain -- for the Commission to modify its decision with respect to recovery of the costs of cable equipment promotional offerings. Its arguments must be rejected.

CONCLUSION

For the reasons stated above, the Bell Atlantic Petition should be dismissed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Neal M. Goldberg", is written over the printed name.

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
Diane B. Burstein
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202)775-3664

Counsel for National Cable
Television Association, Inc.

June 16, 1994

CERTIFICATE OF SERVICE

I, Neal M. Goldberg, hereby certify that on June 16, 1994, copies of the foregoing "Opposition of the National Cable Television Association, Inc. to the Petition of Bell Atlantic For Further Reconsideration" were served by First Class Mail, postage prepaid, on the following:

Michael E. Glover, Esquire
Bell Atlantic Telephone Companies
1710 H Street, N.W.
Washington, D.C. 20004


Neal M. Goldberg